

By the Committee on Rules; and Senators Brandes, Perry, Baxley,
and Hutson

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1 A bill to be entitled
2 An act relating to civil liability for damages
3 relating to COVID-19; creating s. 768.38, F.S.;
4 providing legislative findings and intent; defining
5 terms; specifying requirements for civil actions based
6 on COVID-19-related claims; requiring the court to
7 make certain determinations in such actions; providing
8 that plaintiffs have the burden of proof in such
9 actions; requiring plaintiffs to commence COVID-19-
10 related claims within specified timeframes; creating
11 s. 768.381, F.S.; defining terms; providing
12 preliminary procedures for civil actions based on
13 COVID-19-related claims; providing the standard of
14 proof required at trial for such claims; providing
15 affirmative defenses; requiring COVID-19-related
16 claims to commence within specified timeframes;
17 providing construction; providing that the act
18 provides the exclusive cause of action for COVID-19-
19 related claims against health care providers;
20 providing applicability; providing severability;
21 providing applicability and for retroactive
22 application; providing an effective date.

23
24 WHEREAS, an outbreak of the disease known as COVID-19,
25 which is caused by a novel coronavirus that was not previously
26 found in humans, occurred in Hubei province, China, in late
27 2019, and has currently been detected in more than 89 countries,
28 including the United States, and

29 WHEREAS, COVID-19 is a severe respiratory disease that can

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30 result in illness or death and is caused by the person-to-person
31 spread of the novel coronavirus, and

32 WHEREAS, COVID-19, as a viral agent capable of causing
33 extensive loss of life or serious disability, is deadly, and

34 WHEREAS, the transmission of COVID-19 is a threat to human
35 health in this state, and

36 WHEREAS, the Secretary of the United States Department of
37 Health and Human Services declared on January 31, 2020, that a
38 public health emergency exists in the United States due to
39 confirmed cases of COVID-19 in this country, and

40 WHEREAS, on March 1, 2020, the State of Florida Department
41 of Health, in coordination with Governor Ron DeSantis, first
42 declared a public health emergency based on the spread of COVID-
43 19, and

44 WHEREAS, throughout the declared state of emergency, the
45 Governor's executive orders included industry-specific
46 restrictions to prevent the spread of COVID-19 based on the best
47 information available at the time, allowing and encouraging
48 certain businesses to continue to safely operate, and

49 WHEREAS, a strong and vibrant economy is essential to
50 ensure that Floridians may continue in their meaningful work and
51 ultimately return to the quality of life they enjoyed before the
52 COVID-19 outbreak, and

53 WHEREAS, Floridians must be allowed to earn a living and
54 support their families without unreasonable government
55 intrusion, and

56 WHEREAS, the United States Centers for Disease Control and
57 Prevention has issued health guidance to all state and local
58 governments and all citizens, and

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59 WHEREAS, in March 2020, the Centers for Medicare and
60 Medicaid Services recommended the deferral of nonessential
61 surgeries and other procedures, and

62 WHEREAS, the guidance from the Centers for Medicare and
63 Medicaid Services to defer medical procedures was based in part
64 on its recognition that the conservation of critical health care
65 resources is essential, and

66 WHEREAS, on March 20, 2020, the Governor issued Executive
67 Order 20-72, which prohibited health care providers "from
68 providing any medically unnecessary, non-urgent or non-emergency
69 procedure or surgery which, if delayed, does not place a
70 patient's immediate health, safety, or well-being at risk, or
71 will, if delayed, not contribute to the worsening of a serious
72 or life-threatening medical condition," and

73 WHEREAS, on April 29, 2020, the Governor issued Executive
74 Order 20-112, which allowed health care providers to perform
75 procedures prohibited by the earlier order if the health care
76 provider had adequate supplies of personal protective equipment
77 and satisfied other conditions, and

78 WHEREAS, medical experts have been racing to develop
79 vaccines and to learn how COVID-19 is transmitted and how best
80 to treat those infected with the disease, and

81 WHEREAS, the Federal Government, along with state and local
82 governments, has sought to slow the spread of COVID-19 through
83 travel bans and restrictions, quarantines, lockdowns, social
84 distancing, and the closure of businesses or limitations on
85 business activities, including limitations on the provision of
86 medical services, and

87 WHEREAS, health care providers, including hospitals,

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88 doctors, nurses, and other health care facilities and workers,
89 have struggled to acquire personal protective equipment and
90 other supplies to protect against the risk of COVID-19
91 transmission and medications used in the treatment of the
92 disease, and

93 WHEREAS, the circumstances of the COVID-19 pandemic have
94 made it difficult or impossible for health care providers to
95 maintain ideal levels of staffing, and

96 WHEREAS, health care providers are essential to the
97 residents of this state's survival of the pandemic, and health
98 care providers have continued to treat patients despite the
99 potential, and still not fully known, risks of exposure to
100 COVID-19, and

101 WHEREAS, while many actions may seem reasonable during the
102 pandemic, some may attempt to construe these actions differently
103 in hindsight when calm is restored, and

104 WHEREAS, as the pandemic continues and recovery begins,
105 health care providers must be able to remain focused on serving
106 the health care needs of their respective communities and not on
107 the potential for unfounded lawsuits, and

108 WHEREAS, the Legislature finds that it is an overpowering
109 public necessity to enact legislation that will deter unfounded
110 lawsuits against individuals, businesses, health care providers,
111 and other entities based on COVID-19-related claims, while
112 allowing meritorious claims to proceed, and

113 WHEREAS, the Legislature finds that the unprecedented and
114 rare nature of the COVID-19 pandemic, together with the
115 indefinite legal environment that has followed, requires the
116 Legislature to act swiftly and decisively, NOW, THEREFORE,

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Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 768.38, Florida Statutes, is created to read:

768.38 Liability protections for COVID-19-related claims.—

(1) The Legislature finds that the COVID-19 outbreak in this state threatens the continued viability of certain business entities, educational institutions, governmental entities, and religious institutions that contribute to the overall well-being of this state. The threat of unknown and potentially unbounded liability to such businesses, entities, and institutions, in the wake of a pandemic that has already left many of these businesses, entities, and institutions vulnerable, has created an overpowering public necessity to provide an immediate and remedial legislative solution. Therefore, the Legislature intends for certain business entities, educational institutions, governmental entities, and religious institutions to enjoy heightened legal protections against liability as a result of the COVID-19 pandemic. The Legislature also finds that there are no alternative means to meet this public necessity, especially in light of the sudden, unprecedented nature of the COVID-19 pandemic. The Legislature finds the public interest as a whole is best served by providing relief to these businesses, entities, and institutions so that they may remain viable and continue to contribute to this state.

(2) As used in this section, the term:

(a) "Business entity" has the same meaning as provided in s. 606.03. The term also includes a charitable organization as

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146 defined in s. 496.404 and a corporation not for profit as
147 defined in s. 617.01401.

148 (b) "COVID-19-related claim" means a civil liability claim
149 against a person, including a natural person, a business entity,
150 an educational institution, a governmental entity, or a
151 religious institution, which arises from or is related to COVID-
152 19, otherwise known as the novel coronavirus. The term includes
153 any such claim for damages, injury, or death. Any such claim, no
154 matter how denominated, is a COVID-19-related claim for purposes
155 of this section. The term includes a claim against a health care
156 provider only if the claim is excluded from the definition of
157 COVID-19-related claim under s. 768.381, regardless of whether
158 the health care provider also meets one or more of the
159 definitions in this subsection.

160 (c) "Educational institution" means a school, including a
161 preschool, elementary school, middle school, junior high school,
162 secondary school, career center, or postsecondary school,
163 whether public or nonpublic.

164 (d) "Governmental entity" means the state or any political
165 subdivision thereof, including the executive, legislative, and
166 judicial branches of government; the independent establishments
167 of the state, counties, municipalities, districts, authorities,
168 boards, or commissions; or any agencies that are subject to
169 chapter 286.

170 (e) "Health care provider" means:

171 1. A provider as defined in s. 408.803.

172 2. A clinical laboratory providing services in this state
173 or services to health care providers in this state, if the
174 clinical laboratory is certified by the Centers for Medicare and

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175 Medicaid Services under the federal Clinical Laboratory
176 Improvement Amendments and the federal rules adopted thereunder.

177 3. A federally qualified health center as defined in 42
178 U.S.C. s. 1396d(1)(2)(B), as that definition exists on the
179 effective date of this act.

180 4. Any site providing health care services which was
181 established for the purpose of responding to the COVID-19
182 pandemic pursuant to any federal or state order, declaration, or
183 waiver.

184 5. A health care practitioner as defined in s. 456.001.

185 6. A health care professional licensed under part IV of
186 chapter 468.

187 7. A home health aide as defined in s. 400.462(15).

188 8. A provider licensed under chapter 394 or chapter 397 and
189 its clinical and nonclinical staff providing inpatient or
190 outpatient services.

191 9. A continuing care facility licensed under chapter 651.

192 10. A pharmacy permitted under chapter 465.

193 (f) "Religious institution" has the same meaning as
194 provided in s. 496.404.

195 (3) In a civil action based on a COVID-19-related claim:

196 (a) The complaint must be pled with particularity.

197 (b) At the same time the complaint is filed, the plaintiff
198 must submit an affidavit signed by a physician actively licensed
199 in this state which attests to the physician's belief, within a
200 reasonable degree of medical certainty, that the plaintiff's
201 COVID-19-related damages, injury, or death occurred as a result
202 of the defendant's acts or omissions.

203 (c) The court must determine, as a matter of law, whether:

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204 1. The plaintiff complied with paragraphs (a) and (b). If
205 the plaintiff did not comply with paragraphs (a) and (b), the
206 court must dismiss the action without prejudice.

207 2. The defendant made a good faith effort to substantially
208 comply with authoritative or controlling government-issued
209 health standards or guidance at the time the cause of action
210 accrued.

211 a. During this stage of the proceeding, admissible evidence
212 is limited to evidence tending to demonstrate whether the
213 defendant made such a good faith effort.

214 b. If the court determines that the defendant made such a
215 good faith effort, the defendant is immune from civil liability.
216 If more than one source or set of standards or guidance was
217 authoritative or controlling at the time the cause of action
218 accrued, the defendant's good faith effort to substantially
219 comply with any one of those sources or sets of standards or
220 guidance confers such immunity from civil liability.

221 c. If the court determines that the defendant did not make
222 such a good faith effort, the plaintiff may proceed with the
223 action. However, absent at least gross negligence proven by
224 clear and convincing evidence, the defendant is not liable for
225 any act or omission relating to a COVID-19-related claim.

226 (d) The burden of proof is upon the plaintiff to
227 demonstrate that the defendant did not make a good faith effort
228 under subparagraph (c)2.

229 (4) A plaintiff must commence a civil action for a COVID-
230 19-related claim within 1 year after the cause of action accrues
231 or within 1 year after the effective date of this act if the
232 cause of action accrued before the effective date of this act.

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233 Section 2. Section 768.381, Florida Statutes, is created to
234 read:

235 768.381 COVID-19-related claims against health care
236 providers.-

237 (1) DEFINITIONS.-As used in this section, the term:

238 (a) "Authoritative guidance" means nonbinding instructions
239 or recommendations from a federal, state, or local governmental
240 entity, a clinical professional organization, or another
241 authoritative source of clinical guidance.

242 (b) "COVID-19" means the novel coronavirus identified as
243 SARS-CoV-2; any disease caused by SARS-CoV-2, its viral
244 fragments, or a virus mutating therefrom; and all conditions
245 associated with the disease which are caused by SARS-CoV-2, its
246 viral fragments, or a virus mutating therefrom.

247 (c) "COVID-19 emergency" means a public health emergency
248 relating to COVID-19 which is declared by an emergency
249 declaration of the Federal Government or an emergency order of
250 the State Surgeon General or a state of emergency due to COVID-
251 19 declared by executive order of the Governor.

252 (d) "COVID-19-related claim" means a civil liability claim
253 against a health care provider which arises from the:

- 254 1. Diagnosis or treatment of, or failure to diagnose or
255 treat, a person for COVID-19;
- 256 2. Provision of a novel or experimental COVID-19 treatment;
- 257 3. Transmission of COVID-19;
- 258 4. Delay or cancellation of a surgery or a delay or
259 cancellation of a medical procedure, a test, or an appointment
260 based on a health care provider's interpretation or application
261 of government-issued health standards or authoritative guidance

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262 specifically relating to the COVID-19 emergency;

263 5. An act or omission with respect to an emergency medical
264 condition as defined in s. 395.002, and which act or omission
265 was the result of a lack of resources directly caused by the
266 COVID-19 pandemic; or

267 6. The provision of treatment to a patient diagnosed with
268 COVID-19 whose injuries were directly related to an exacerbation
269 of the patient's preexisting conditions by COVID-19.

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271 The term does not include a claim alleging that an act or
272 omission by a health care provider caused a person to contract
273 COVID-19 or a derivative claim to such claim unless the person
274 was a resident or patient of the health care provider or a
275 person seeking care or treatment from the health care provider.

276 (e) "Government-issued health standards" means federal,
277 state, or local laws, rules, regulations, or orders that
278 describe the manner in which a health care provider must
279 operate.

280 (f) "Health care provider" means any of the following:

281 1. A provider as defined in s. 408.803.

282 2. A clinical laboratory providing services in this state
283 or services to health care providers in this state, if the
284 clinical laboratory is certified by the Centers for Medicare and
285 Medicaid Services under the federal Clinical Laboratory
286 Improvement Amendments and the federal rules adopted thereunder.

287 3. A federally qualified health center as defined in 42
288 U.S.C. s. 1396d(1)(2)(B), as that definition existed on the
289 effective date of this act.

290 4. Any site providing health care services which was

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291 established for the purpose of responding to the COVID-19
292 pandemic pursuant to any federal or state order, declaration, or
293 waiver.

294 5. A health care practitioner as defined in s. 456.001.

295 6. A health care professional licensed under part IV of
296 chapter 468.

297 7. A home health aide as defined in s. 400.462(15).

298 8. A provider licensed under chapter 394 or chapter 397 and
299 its clinical and nonclinical staff providing inpatient or
300 outpatient services.

301 9. A continuing care facility licensed under chapter 651.

302 10. A pharmacy permitted under chapter 465.

303 (2) PRELIMINARY PROCEDURES.—

304 (a) In any civil action against a health care provider
305 based on a COVID-19-related claim, the complaint must be pled
306 with particularity by alleging facts in sufficient detail to
307 support each element of the claim. An affidavit of a physician
308 is not required as part of the pleading.

309 (b) If the complaint is not pled with particularity, the
310 court must dismiss the action.

311 (3) STANDARD OF PROOF.—A plaintiff who brings an action for
312 a COVID-19-related claim against a health care provider must
313 prove by the greater weight of the evidence that the health care
314 provider was grossly negligent or engaged in intentional
315 misconduct.

316 (4) AFFIRMATIVE DEFENSES.—If a health care provider proves
317 by the greater weight of the evidence the existence of an
318 affirmative defense that applies to a specific COVID-19-related
319 claim, the health care provider has no liability for that claim.

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320 The affirmative defenses that may apply to a COVID-19-related
321 claim against a health care provider include, in addition to any
322 other affirmative defenses recognized by law, the health care
323 provider's:

324 (a) Substantial compliance with government-issued health
325 standards specifically relating to COVID-19 or other relevant
326 standards, including standards relating to the preservation or
327 prioritization of supplies, materials, or equipment;

328 (b) Substantial reliance upon government-issued health
329 standards specific to infectious diseases in the absence of
330 standards specifically applicable to COVID-19;

331 (c) Substantial compliance with government-issued health
332 standards relating to COVID-19 or other relevant standards was
333 not possible due to the widespread shortages of necessary
334 supplies, materials, equipment, or personnel;

335 (d) Substantial compliance with any applicable government-
336 issued health standards relating to COVID-19 or other relevant
337 standards if the applicable standards were in conflict; or

338 (e) Substantial compliance with government-issued health
339 standards relating to COVID-19 or other relevant standards was
340 not possible because there was insufficient time to implement
341 the standards.

342 (5) LIMITATIONS PERIOD.—

343 (a) An action for a COVID-19-related claim against a health
344 care provider which arises out of the transmission, diagnosis,
345 or treatment of COVID-19 must commence within 1 year after the
346 later of the date of death due to COVID-19, hospitalization
347 related to COVID-19, or the first diagnosis of COVID-19 which
348 forms the basis of the action.

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349 (b) An action for a COVID-19-related claim against a health
350 care provider which does not arise out of the transmission,
351 diagnosis, or treatment of COVID-19, such as a claim arising out
352 of a delayed or canceled procedure, must commence within 1 year
353 after the cause of action accrues.

354 (c) Notwithstanding paragraph (a) or paragraph (b), an
355 action for a COVID-19-related claim that accrued before the
356 effective date of this act must commence within 1 year after the
357 effective date of this act.

358 (6) INTERACTION WITH OTHER LAWS.—

359 (a) This section is in addition to other provisions of law,
360 including, but not limited to, chapters 400, 429, 766, and 768,
361 and supersedes any conflicting provision of law but only to the
362 extent of the conflict.

363 (b) This section provides the exclusive cause of action for
364 a COVID-19-related claim against a health care provider.

365 (c) This section does not apply to claims governed by
366 chapter 440.

367 Section 3. If any provision of this act or its application
368 to any person or circumstance is held invalid, the invalidity
369 does not affect other provisions or applications of the act
370 which can be given effect without the invalid provision or
371 application, and to this end the provisions of this act are
372 severable.

373 Section 4. This act applies to causes of action that accrue
374 within 1 year after the effective date of this act and applies
375 retroactively. However, this act does not apply in a civil
376 action against a particular named defendant which is commenced
377 before the effective date of this act.

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Section 5. This act shall take effect upon becoming a law.